No. 15829

United States
COURT OF APPEALS
for the Ninth Circuit

ALBINA ENGINE & MACHINE WORKS, INC., a corporation,

Appellant,

vs.

AMERICAN MAIL LINE, LTD., a corporation,

Appellee.

REPLY BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon

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SUMMARY OF ARGUMENT

That part of appellee's brief headed "Tort Feasor Cases Irrelevant" (App. Br. 14) it is contended is an erroneous statement of the law of indemnity in that the appellee contends:

> "Even if appellee had been negligent, which we have shown it was not, this would not preclude recovery." (p. 14).

ARGUMENT

Counsel for the appellee argued in the trial Court, as he argues here, that it was immaterial whether or not the ship was guilty of negligence. It is appellee's argument that this is a contract case and, therefore, whether or not the ship was negligent is not an issue. The trial Court accepted this contention as is illustrated by the Court's remarks, a portion of which are quoted in the record:

> "The Court: As I was saying to Mr. Denecke, I don't see what difference that makes, whether they should have known about it or not. You are not saying they did know about it. You are saying they should have known about it. I don't see what difference that makes. This is a contract case." (Tr. 110-111).

Counsel for the appellee argued to the trial Court:

> "Now, I don't know that I need to say anything about Mr. Denecke's contention that the Mate should have examined this equipment before the boat was lowered to see that the link was in the hook, as the Captain, the last witness, said it was his duty to do.
>
> "The Court: That, again, is tort law." (Tr. 112).

A reading of that portion of the argument and the Court's remarks thereon which is contained in the printed record, clearly shows that both counsel for the appellee and the trial Court, believed that whether or not the ship was negligent or culpable had nothing to do with the issues and the trial Court was of the opinion that if the evidence showed there was a contract requiring the appellant Albina Engine & Machine Works

to report the defects and the sailors were injured as a failure to report them, then the ship was entitled to recover indemnity.

In the appellee's brief, it is stated:

> "Even if Appellee had been negligent, which we have shown it was not, this would not preclude recovery.
>
> * * *
>
> "The only thing that could bar Appellee would be conduct on its part which prevented or greatly hindered Appellant from performing its contract."

The appellant submits that the decisions of *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*, 350 U.S. 124, 76 S. Ct. 232, and *Weyerhaeuser SS Co. v. Nacirema Operating Co., Inc.*, 26 L.W. 4139 (March 3, 1958), definitely do not support the contention made by the appellee.

In the *Ryan* case, the ship was initially held liable to the injured longshoreman because the longshoreman was injured by reason of improperly stowed cargo. The stevedore's defense to the indemnity action was "* * * that, because the shipowner had an obligation to supervise the stowage and had a right to reject unsafe stowage of the cargo and did not do so, it now should be barred from recovery from the stevedoring company of any damage caused by that contractor's uncorrected failure to stow the rolls 'in a reasonably safe manner'." (p. 134).

The majority opinion's answer to that contention was:

> "Whatever may have been the respective obligations of the stevedoring contractor and of the ship-

> owner to the injured longshoreman for proper stowage of the cargo, it is clear that, as between themselves, the contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense. Respondent's failure to discover and correct petitioner's own breach of contract cannot here excuse that breach."

Paraphrasing, the majority of the Supreme Court held that failure of the ship to find and correct a condition created by the stevedore was not "conduct on its part sufficient to preclude recovery." *Weyerhaeuser SS Co. v. Nacirema Operating Co., Inc.,* supra.

In the present case, the condition was created or allowed to occur by the ship, the would-be indemnitee, not the ship repairer.

In the Weyerhaeuser case, supra, the longshoreman was injured by a board falling from a wood shack. The Supreme Court held, contrary to appellee's claim in the case, that if the jury found the ship negligent in certain particulars, then the ship would be barred from recovering indemnity from the stevedore. The Court's decision actually was that there were certain fact questions necessary for determination of the right to indemnity, but these had not been submitted to the jury. However, the Court's opinion was, it is believed, that the ship's failure to remove the shelter when the ship left New York, or the ship's failure to warn the stevedore of a latent dangerous condition known to the ship would bar the ship from indemnity. The Court did state, on the precedent of *Ryan,* that the ship's failure in port to find and correct the unsafe condition

created by the stevedore, would not bar the ship from indemnity.

The Court generally stated the law of indemnity to be:

> "We believe that respondent's contractual obligation to perform its duties with reasonable safety related not only to the handling of cargo, as in *Ryan,* but also to the use of equipment incidental thereto, such as the winch shelter involved here (cases cited). If in that regard respondent (stevedore) rendered a substandard performance which forseeingly led to petitioner's liability, the latter was entitled to indemnity *absent conduct on its part sufficient to preclude recovery.*"

Here the appellee, the shipowner, as a matter of law, was guilty of "conduct on its part sufficient to preclude recovery."

Respectfully submitted,

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By ARNO H. DENECKE,

Attorneys for Appellant.